# STATE OF MICHIGAN

# COURT OF APPEALS

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DENNIS DE LONG, Personal Representative of the ESTATE of FRANKLIN A. DENISON, SR.,

Plaintiff/Counter-Defendant-Appellant,

v

PALM BEACH POLO HOLDINGS, INC,

Defendant/Counter-Plaintiff-Appellee,

and

KK AGGREGATES, INC.,

Defendant/Counter-Plaintiff.

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UNPUBLISHED
June 24, 2010

No. 284444
Allegan Circuit Court
LC No. 05-038095-CH

Before: MARKEY, P.J., and ZAHRA, and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals from a judgment and order of trial court that ordered defendant Palm Beach Polo Holdings, LLC (Polo) to pay plaintiff nominal damages in the amount of $2 for two separate breaches of contract, and $3 for three separate trespasses. Plaintiff appeals as of right. We reverse and remand for determination of damages of plaintiff's unjust enrichment claim.

## I. BASIC FACTS AND PROCEEDINGS

During the 1990s, Frank Denison and his wife owned a parcel of land in Saugatuck that bordered the Kalamazoo River. In 1993, they entered into an agreement with Broward Marine, Inc. (Broward), a company they owned together, to lease a portion of their waterfront property (Master Lease). The Master Lease did not describe the physical dimensions of the property but merely recited the physical address. The Master Lease prohibited the tenant, Broward, from subleasing the property. In 1998, Polo's president and chief executive officer, Glen Straub, purchased Broward's assets and assumed Broward's interests under the Master Lease with Denison, which required $25,450 per year for rent. Polo then operated a business out of the property and facility for approximately four years until 2002, at which point it moved its

inventory to a facility in Florida. Meanwhile, Denison passed away, and his estate retained his one-half interest in the real estate upon which the leased property sat.

In April of 2002, Polo filed a lawsuit against the Denison estate because the parties could not agree on the value and size of the property ("first lawsuit"). The case was later resolved, resulting in a determination that the property included 235 feet of river frontage, and not 575 feet. While that suit was pending, however, Polo, in November of 2002, subleased use of the property and notably, Polo's facilities, to Westease Yacht Service, Inc. (Westease), subject to the terms of the Master Lease, with rent in the amount of $100,000 per year, payable to Polo. The sublease expressly notified Westease of the pending litigation and provided that, "[i]n the event of an adverse ruling against the interests of Polo, Polo shall not be liable for any damages." The sublease indicated that the property included 575 feet of frontage on the Kalamazoo River.

Westease then filed a lawsuit alleging Polo had subleased to Westease more land than Polo had leased from the Denison estate ("second lawsuit"). The trial court in that case ordered that the sublease be reformed to show that the property was not 5.1 acres with 575 feet of river frontage, but 3.08 acres with 235 feet of river frontage. The trial court further reduced the rent under the sublease by 25 percent to reflect the value recommended by the court-appointed appraiser. The reformation was retroactive to May of 2005, when Westease filed its lawsuit. That order, dated January 27, 2007, also concluded that Westease had paid Polo a total of $298,739.41 in rent for the roughly four-year period it subleased the property, and that Westease was entitled to a refund for any amount it had overpaid. Westease was eventually evicted from the property and removed its belongings from the property that fall.

In July of 2005, plaintiff filed the instant lawsuit against Polo and K&K for breach of contract, unjust enrichment, constructive trust, and trespass ("instant lawsuit"). Plaintiff essentially alleged that Polo had subleased to Westease more of the Denison estate's property than Polo had leased from plaintiff. De Long testified Westease often parked several boats on land that exceeded the 3.08 acres and used seawall frontage beyond the 235 feet. He also learned that Westease employees had excavated, graded and widened a washed-out portion of the access road, and removed at least two large trees and several saplings to transport a large boat to the facility. De Long also learned that Polo had assigned a portion of its interest in the property and facility to K&K Aggregates (K&K), a company owned by Straub's daughters, in violation of the terms of the Master Lease.

The matter went to a bench trial in January of 2008, and the trial court issued its opinion and judgment shortly thereafter, finding that Polo breached the Master Lease by assigning its rights to K&K and when Westease exceeded the scope of the easement. Further, Polo committed three specific instances of trespass by virtue of Westease's use of land in excess of the 3.08 acre/235 feet parcel that was the subject of the Master Lease. The trial court, however, awarded only $5 total in nominal damages. The trial court also found no cause of action on plaintiff's third claimed breach of contract and constructive trust claims. The trial court concluded that "Polo was unjustly enriched, as a matter of fact." However, the trial court concluded plaintiff failed to present sufficient evidence of damages, holding:

> . . . this Court is unable to make a finding as to the amount that Polo was unjustly enriched. The amount that would be compensation for unjust enrichment

> would be the same amount of money Polo received that rightfully belonged to the Denison Estate. The Denison Estate failed to submit any evidence in that regard.
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> The Denison Estate contends that the excess 2.02 acres that Polo rented must be worth the amount of the 25% reduction granted by this Court. The Denison Estate submitted no evidence of the value of the two acres aside from this Court's opinion. However, the Denison Estate's logic in extending this Court's order is flawed. First, the reformation and reduction in rent reflected the difference in rental value to Westease between 575 feet of river frontage and 235 feet of river frontage.
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> However, it is not the same to say that the value to Westease is the same as the amount Polo was unjustly enriched. The rental value to Westease is different than the rental value to the Denison Estate. As previously noted, Polo was leasing the land from the Denison Estate for $25,000 per year—25% of what Westease was paying to Polo. While it is 'possible' that the value was similar, it does not necessarily follow, and the Denison Estate failed to make any showing that it was, indeed, the same.
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> As a result of the Denison Estate's failure to submit evidence, this Court is unable to make a factual finding as to the amount the Polo by which [sic] unjustly enriched. [footnotes omitted.]

This appeal ensued.

## II. DAMAGES

On appeal, plaintiff first argues that the trial court erred in finding insufficient evidence of damages for unjust enrichment.[1] We agree.

Initially, we note that the parties agreed to bifurcate claims for damages based on those arising before and after May 2005. As mentioned, the trial court in the second lawsuit had ordered that the sublease be reformed retroactive to May of 2005, reduced the rent under the sublease by 25 percent and ordered Polo to repay the amount Westease had overpaid. Given that Polo was ordered to repay Westease the amount overpaid, we conclude Polo was not enriched after May 2005 and plaintiff's claim properly lay against Westease for trespass. Thus, in regard

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[1] We reject the trial court's conclusion and Polo's contention that unjust enrichment is not available because plaintiff asserted a legal claim for trespass. "If two remedies are to be combined in one recovery, . . . limiting principles require that the combined recovery must not exceed the greater of (a) full compensation of or (b) full disgorgement. If the compensation does not exceed full compensation, or full disgorgement of the unjust enrichment, then it should be permitted." Dobbs, Law of Remedies, 2nd ed, § 4.5(5), Compensatory damages and Restitution. Here, a trespass claim by plaintiff against defendant did not provide full disgorgement and restitution is permissible.

to damages arising after May 2005, we conclude the trial court correctly concluded that plaintiff failed to submit evidence that Polo was unjustly enriched.

In regard to damages arising before May 2005, however, we conclude the trial court erred in finding no evidence of damages. We initially note that whether "[t]he rental value to Westease is different than the rental value to the Denison Estate" is irrelevant to plaintiff's claim. "[U]nder the equitable doctrine of unjust enrichment, "'a person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006), quoting *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999). Restitution is generally an alternative to damages. 2 Michigan Law of Damages and Other Remedies, § 25.1, 25-1. "If the purpose of damages is, first and foremost, to compensate a victim of a breach, the purpose of restitution is disgorgement of a wrongdoer's ill-gotten gain." *Id*. "Courts impose restitution when it is determined as a matter of justice and equity that the wrongdoer should be required to pay for the benefit derived." *Id*. at 25-2.

The trial court committed error in determining Polo's liability in terms of the harm to plaintiff. Rather, the trial court should only have determined whether Polo received ill-gotten gains. Here, there is no question that Westease paid Polo for the use of plaintiff's land that Polo had no right to allow Westease to use. Although the trial court concluded that plaintiff presented no evidence of damages, we find that plaintiff presented some evidence of damages. In particular, plaintiff and Polo agreed that the trial court's opinion in the second lawsuit could be considered as evidence, in which the court "appointed an appraiser to determine the difference between the rental value of the Subject Property with 235 feet of river footage and 575 feet of frontage. The appraiser, in a comprehensive report, estimated a twenty-five percent difference in value." We therefore conclude that plaintiff presented sufficient evidence of damages.

In response, Polo argues that it provided Westease with facilities under the sublease that inflated the court-appointed appraiser's estimate of the property to Westease. However, the trial court's opinion in the second lawsuit does not mention personal property. Further, "the certainty necessary to establishing the amount of damages is less once the fact of damages is established. *Unibar Maintenance Services, Inc v Saigh*, 283 Mich App. 609, 634; 769 NW2d 911 (2009); see also *Chelsea Inv Group LLC v City Of Chelsea*, ___ Mich App ___; ___ NW2d ____ (2010)." We conclude that plaintiff has presented sufficient evidence of damages.

## III. Constructive Trust

Next, plaintiff argues that the trial court incorrectly concluded that plaintiff did not prove the elements of a constructive trust. In particular, plaintiff contends that the trial court required that plaintiff show some wrongdoing on the part of Polo. We review "the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). We "review de novo a trial court's dispositional ruling on an equitable matter." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006).

The Michigan Supreme Court set forth the law of constructive trust in *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993):

> A constructive trust may be imposed "where such trust is necessary to do equity or to prevent unjust enrichment...." *Ooley v Collins*, 344 Mich 148, 158; 73 NW2d 464 (1955). Hence, such a trust may be imposed when property " 'has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property....' " *Potter v Lindsay*, 337 Mich 404, 411; 60 NW2d 133 (1953), quoting *Racho v Beach*, 254 Mich 600, 606-607; 236 NW 875 (1931). Accordingly, it may not be imposed upon parties "who have in no way contributed to the reasons for imposing a constructive trust." *Ooley*, [344 Mich at 158]. The burden of proof is upon the person seeking the imposition of such a trust. *MacKenzie v Fritzinger*, 370 Mich 284; 121 NW2d 410 (1963).

Our review of the record indicates that the trial court quoted the above excerpt, and then stated that plaintiff had "the burden of proving some wrongdoing on the part of Polo." Contrary to plaintiff's argument on appeal, the trial court did not impose a new element to the law, but merely characterized plaintiff's burden of proving its claim. It is hard to imagine plaintiff's proving "fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances[,]" *Kammer Asphalt Paving Co, Inc*, 443 Mich at 188, without showing the Polo did something wrong. The trial court did not misstate or misapply the law.

Further, contrary to plaintiff's claim, we conclude the record does not support the cause of action. Neither the Master Lease nor the sublease describes the physical dimensions of the leased property. The amended sublease attached a drawing of the property showing 575 feet of river frontage, but nothing indicated that it was attached as the result of "fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessit[y,]" as is required for constructive trust. *Id.* Straub testified that he learned of the dimensions of the property on a walk about the land with Denison when Polo assumed Broward's obligations under the Master Lease. He never testified that he was told or shown that the property was only 3.08 acres with 235 feet of river frontage. We also recognize that the previous litigation involving this property resulted in a finding that Polo subleased too much property to Westease. Again, we do not see how that establishes the necessary elements for constructive trust. Moreover, although there was a considerable amount of testimony that Polo subleased to Westease more land than it leased from plaintiff, nothing in the record indicates that Straub, or any Polo employee, knew that it in fact only leased 3.08 acres and 235 feet of river frontage from plaintiff. Absent this crucial evidence, we are not "left with a firm and definite conviction" that the trial court made a mistake. *Marshall Lasser, PC*, 252 Mich App at 110. Thus, the trial court's findings of fact were not clearly erroneous. *Chapdelaine*, 247 Mich App at 169.

## IV. TRESPASS DAMAGES

Next, plaintiff argues that the trial court erred when it concluded that plaintiff's damages were too speculative for the three instances of trespasses committed by Polo. Plaintiff contends

it is entitled to more than the $3 in nominal damages ultimately awarded. We again review "the trial court's findings of fact. . . for clear error and conduct a review de novo of [its] conclusions of law." *Chapdelaine*, 247 Mich App at 169. We also review an award of damages for clear error. *Marshall Lasser, PC*, 252 Mich App at 110. "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Id.*

Damages for a trespass cause of action can be summarized as follows:

> One injured by the trespass of another is entitled to compensation for the injury on two levels. First, a plaintiff will be entitled to general damages for the injury. Dobbs, [Remedies], § 3.2, p 138. "[G]eneral damages are such as the law implies or presumes to have accrued from the wrong complained of." *Bateman v Blake*, 81 Mich 227, 231; 45 NW 831 (1890). Second, a plaintiff may also be entitled to consequential or special damages if specifically pleaded and proved. *Id.* "Special damages are such as really took place, but are not implied by law." *Id.* [*Kratze v Independent Order of Oddfellows*, 442 Mich 136, 148-149; 500 NW2d 115 (1993).]

General damages "generally are measured by the difference between the value of the land before the harm and the value after the harm." *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997). This measure applies, however, only when the damage caused by the trespass is permanent or irreparable. *Kratze*, 442 Mich at 149. "If the injury is reparable, or temporary, the proper measure of damages is the cost of restoration of the property to its original condition, if less than the value of the property before the injury." *Id.* (citation omitted). "However, there is no one fixed, inflexible rule for determining the appropriate sum that will compensate a landowner for the invasion of his interests. Rather, courts are to apply whatever approach is most appropriate to compensate the plaintiff for the loss incurred." *Szymanski*, 221 Mich App at 430 (citation omitted). A plaintiff "may recover additional damages for any injuries actually proved." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 73; 602 NW2d 215 (1999). However, nominal damages are appropriate, "even absent any proof of actual injury[.]" *Id.*

Here, the trial court concluded that plaintiff successfully proved three separate trespasses: the use of the unleased 2.02 acre parcel, the one-time removal of trees along the easement, and the tying up of boats along the 340 feet of unleased seawall. Our review of the record indicates that plaintiff did not prove the harm caused, or damages resulting from, any of the three trespasses. Plaintiff insists that it was entitled to the difference between the money Polo paid plaintiff under the Master Lease, and the rent Polo received from Westease during the term of the sublease. However, this figure does not reflect damage or harm to the property. As stated previously, this figure reflects Polo's unjust enrichment.

On appeal, plaintiff argues that it suffered a loss of the rental value of the additional 2.02 acre/340 feet parcel from the time the sublease began, November of 2002, through when it sold its interest in the property, May of 2006, totaling $95,694.53. This claim, however, is purely hypothetical because plaintiff did not present any evidence at trial that it actually intended to rent or attempted to rent this parcel of land for that amount and was unable to do so because of the trespass. Plaintiff merely suggests on appeal that it could have made that amount of money had

it chosen to rent the parcel. Absent a showing of actual damages, the trial court had little choice but to award only nominal damages. *Adams*, 237 Mich App at 67, 73; *Kratze*, 442 Mich at 151 (reasoning that a trial court need not speculate as to the value of a plaintiff's damages resulting from a trespass). We are not "left with a firm and definite conviction that a mistake has been made" and find no clear error. *Marshall Lasser, PC*, 252 Mich App at 110.

## V. POST-TRIAL MOTION

Next, plaintiff argues that the trial court failed to include a concise statement of its reasoning in its order denying plaintiff's post-trial motion to re-open the case on damages, in violation of MCR 2.611(F). Plaintiff contends it was prejudiced and seeks a reversal. We review a trial court's decision to grant a new trial under MCR 2.611 for abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). We review de novo matters of statutory interpretation. *Toll Northville LTD v Northville Twp*, 480 Mich 6, 10-11; 743 NW2d 902 (2008).

After the trial court issued its opinion and judgment, plaintiff moved to reopen the case and for post-judgment relief pursuant MCR 2.611(A)(1)(e), (g) and (h). The trial court denied the motion, stating: "IT IS ORDERED that Plaintiff's Motion to Re-Open Case and for Post-Judgment Relief Regarding Damages issues" [sic] is hereby DENIED." This cursory denial violated MCR 2.611(F) ("In ruling on a motion for a new trial or a motion to amend the judgment, the court shall give a concise statement of the reasons for the ruling, either in an order or opinion filed in the action or on the record."). However, plaintiff has not alleged or offered any support for the position it takes. The record does not support that an order with the required concise statement would have been less prejudicial than the order actually issued. Plaintiff also does not indicate how or why the cursory order resulted in prejudice, or what form that prejudice took. Accordingly, we find that the trial court's error was harmless. MCR 2.613(A).

Reversed in part and remanded for determination of damages of plaintiff's unjust enrichment claim. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher